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Supreme Court of the United States

OCTOBER TERM 1959

No. 653

WILLIAM MEYERS, STANDARD BRANDS INCORPORATED, ATLANTIC GUMMED PAPER CORPORATION and WARSHAW MANUFACTURING, INC.,

Petitioners,

vs.

FAMOUS REALTY, INC., and MOSES SPATT and JOSEPH S. WOHL, individually and as Director Trustees in Dissolution thereof,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Of Counsel

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WILLIAM MEYERS, STANDARD BRANDS INCORPORATED, ATLANTIC GUMMED PAPER CORPORATION and WARSHAW MANUFACTURING, INC., *Petitioners,* vs. FAMOUS REALTY, INC., and MOSES SPATT and JOSEPH S. WOHL, individually and as Director-Trustees in Dissolution thereof, *Respondents.*	No. 653

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Questions Presented

1. (a) Where a railroad had been operated in part upon leased land owned by respondents, and

(b) Where the respondent lessors were not and never had been carriers by railroad, and

(c) Where the lessee railroad company, pursuant to authority granted by an order of the Interstate Commerce Commission affirmed by a three-judge statutory court, had lawfully abandoned all operations,—was not the Court of Appeals correct in holding that the respondent lessors were not obligated to undertake, commence and carry on the interstate operations of the abandoned railroad?

2. Is not this action now moot?

Suggestion of Facts Rendering the Action Moot

Pursuant to authority granted by the Interstate Commerce Commission, the lessee railroad company abandoned all operations on June 29, 1959, after the Commission's decision was affirmed by a three-judge statutory court, and shortly prior to the commencement of this action (Complaint par. 14).

On December 11, 1959, forty-five days after the decision of the Court of Appeals affirming the dismissal of the complaint herein, the respondent lessors conveyed to Consolidated Edison Company the land which, during the operation of the railroad by the lessee, constituted the Bridge Street Yard in Brooklyn, New York.

The contract for the sale of this property was referred to in the proceedings before the Commission, *Jay Street Connecting Railroad Abandonment*, Finance Docket No. 20240, 307 I. C. C. 137, 154 (1959), aff'd *Jay Street Connecting Railroad* v. *United States*, 174 F. Supp. 609 (D. C., E. D. N. Y., 1959). Performance of the contract was deferred because of this litigation, and the Court of Appeals (81a) granted respondents' motion (74a-79a) for this reason to expedite the hearing of petitioners' appeal from the District Court's judgment of dismissal. Following the affirmance of this judgment, petitioners made no effort to stay the mandate of the Court of Appeals or to obtain an injunction pending application to this Court for a writ of certiorari.

The Bridge Street Yard was the focal point of the operations of the lessee, The Jay Street Connecting Railroad. The main track of that railroad extended for seven city blocks in a small area of Brooklyn lying along the East River under and on either side of the ramp of the Manhattan Bridge. The railroad had no passenger traffic. The Bridge

Street Yard was the main yard; it contained team tracks, holding tracks, classification tracks and the float bridge. All of the interstate traffic of The Jay Street Connecting Railroad was carried by water on carfloats which docked at the float bridge in the Bridge Street Yard. The disposal of this property precludes reconstitution of the facilities formerly used by the railroad in the abandoned operations.

The facts concerning this property and its sale are stated in the affidavit of Joseph S. Wohl, which has been lodged with the Clerk of this Court. Appendix A hereto is a copy of that affidavit.

Statutes Involved

The relevant sections of the Interstate Commerce Act are as follows:

> **Title 49 U. S. C. § 1(1):** "The provisions of this chapter shall apply to common carriers engaged in——
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water——
>
> From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia. * * *"
>
> **Title 49 U. S. C. § 1(2):** "The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelli-

gence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply——

* * * *

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district."

Title 49 U. S. C. § 1(18): "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

Title 49 U. S. C. § 1(20): "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Statement

Petitioners on June 30, 1959 filed their complaint in the District Court for the Eastern District of New York, seeking a mandatory injunction requiring respondents to carry on the interstate operations of The Jay Street Connecting Railroad until such time as respondents should themselves

be authorized by order of the Interstate Commerce Commission to abandon such operation or until such time as respondents should lease to one of the petitioners all property theretofore leased to The Jay Street Connecting Railroad. Petitioners moved for a preliminary injunction and respondents cross-moved for an order dismissing the complaint. On July 10, 1959, judgment was entered in the District Court granting respondents' cross-motion to dismiss the complaint and denying petitioners' motion for a preliminary injunction. The Court of Appeals for the Second Circuit affirmed on October 27, 1959.

The Jay Street Connecting Railroad operated under authority granted to it in 1941 by the Interstate Commerce Commission in *Jay Street Connecting Railroad Acquisition*, 244 I. C. C. 43. Pursuant to permission granted in that proceeding, The Jay Street Connecting Railroad leased land used in its operations from two partnerships, Jay Street Terminal and Arbuckle Brothers, which then owned all of its stock. (Complaint pars. 4-5.)

Thereafter, in or about 1945, respondent Famous Realty, Inc. acquired from the two partnerships all of the stock of The Jay Street Connecting Railroad and the land leased by the partnerships to that railroad. Famous Realty, Inc. was dissolved in or about 1958. Respondents Moses Spatt and Joseph S. Wohl were the sole distributees of its property and are the parties on whom petitioners seek to impose the obligation of carrying on the railroad. (Complaint pars. 6-8.)

By order dated April 13, 1959, amended May 26, 1959, the Interstate Commerce Commission issued a certificate of public convenience and necessity authorizing The Jay Street Connecting Railroad, because of the heavy and continuous losses incurred and the dwindling volume of freight movement, to abandon all of its operations. *Jay Street Connect-*

ing Railroad Abandonment, supra. In a proceeding brought by the railroad before a three judge statutory court to accelerate the effective date of the Commission's abandonment order, petitioners by cross claim challenged the validity of that order; the order in its entirety was affirmed by said court on June 26, 1959. (*Jay Street Connecting Railroad* v. *United States*, 174 F. Supp. 609 (D. C., E. D. N. Y.); Complaint pars. 9-12.) No appeal was taken.

The theory on which the present action was brought is stated in paragraph 15 of the Complaint:

> "Upon abandonment of a railroad by a lessee of property devoted to railroad use in interstate commerce, the lessors of such land are under a duty themselves to operate the railroad * * *."

The complaint fails to allege, however, that the respondents are or ever have been common carriers by railroad, or to allege any facts which would indicate that any of them ever operated in that capacity. Nor does the complaint allege that this integrated railroad ever was operated by respondents' predecessors in title. Instead the allegation (Complaint par. 5) is that respondent Famous Realty, Inc. acquired from the partnerships, Jay Street Terminal and Arbuckle Brothers, all of the land which had been leased by those partnerships to the railroad. The complaint does not allege that the land so acquired by Famous Realty, Inc. constitutes the entire railroad or that any of the respondents or their grantors ever operated this railroad. The absence of allegation in this regard is not inadvertent; it appears from the decision of the Interstate Commerce Commission (*Jay Street Connecting Railroad Abandonment, supra* 307 I. C. C. at 140, 146, 147) that a central part of the railroad was located on land purchased by Famous Realty, Inc. from one Vanneck, who is not alleged to have been a carrier.

Moreover, other portions of the railroad were situated in the public streets. (Complaint par. 5.)

It further appears from the 1941 decision of the Commission in *Jay Street Connecting Railroad Acquisition, supra*, that The Jay Street Connecting Railroad purchased the facilities formerly used in the transportation activities of the partnerships, consisting solely of marine equipment, namely two tow boats, one steel car float, two wooden car floats, and eight wooden barges. The Commission stated (244 I. C. C. 43, 44):

> "The lines operated by the applicant and the freight house are naturally component parts of one system of transportation. The purpose of the application is to obtain authority to transfer all the partnership's transportation activities to the applicant * * *".

The Commission further stated (p. 46):

> "* * * The managements of the two enterprises have concluded that it is preferable to combine their transportation activities in a duly organized railroad corporation and we think that this is in the public interest."

The Commission, upon application of that "duly organized railroad corporation", has now authorized the abandonment of all of its transportation activities. *Jay Street Connecting Railroad Abandonment, supra*, affirmed by a three-judge statutory court in *Jay Street Connecting Railroad* v. *United States, supra*. The present action would in substance circumvent that decision.

Reasons for Denying The Writ

This case presents no novel or difficult question of law. The decision below was required by the clear words of the

statute, is not in conflict with other authorities, and represents the unanimous view of the Interstate Commerce Commission, the District Court and the Court of Appeals. The decision was one of limited application depending upon the facts of this case, and this case has itself become moot.

ARGUMENT

I

THE DECISION BELOW REPRESENTS A PLAIN APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE AND IS NOT IN CONFLICT WITH OTHER AUTHORITIES

Petitioner contends that the decision of the Court of Appeals conflicts with *Smith* v. *Hoboken R. Co.*, 328 U. S. 123 (1946), *Thompson* v. *Texas, Mexican R. Co.*, 328 U. S. 134 (1946), *Hoboken Railroad, Warehouse and S. S. Connecting Co. Operation*, 257 I. C. C. 739 (1944), and *Livestock Service Terminal Abandonment of Operation*, 257 I. C. C. 1 (1944). Those decisions, pressed in the courts below, were properly considered inapplicable.

In *Smith* v. *Hoboken R. Co.*, *supra*, this Court, in proceedings for reorganization of a railroad under the Bankruptcy Act, reversed an order granting a motion by a lessor railroad to terminate a lease to the debtor railroad. In reversing the order below this Court held that authorization by the Interstate Commerce Commission was required for discontinuance of the operation by the debtor lessee.

Thompson v. *Texas, Mexican R. Co.*, *supra*, likewise involved a lessee railroad in bankruptcy. This Court in the *Smith* case (328 U. S. at 130) defined the holding of the *Thompson* case to be "that a company having trackage

rights over the lines of another must receive authorization to abandon the operations."

Applied to the facts of the instant case, the *Smith* and *Thompson* cases hold merely that it was necessary for The Jay Street Connecting Railroad to obtain the permission—which it did obtain—of the Commission to abandon operations. Neither the *Smith* nor the *Thompson* case dealt with any obligation of a non-carrier lessor.

This Court in the *Smith* case referred to *Hoboken Railroad, Warehouse and S. S. Connecting Co. Operation, supra,* wherein the Interstate Commerce Commission held that no certificate of public convenience and necessity was required to enable the lessor to resume operation upon termination of the lease. In that case, however, the lessor was a common carrier by railroad which had itself operated the line of railroad from a time prior to the enactment of the Interstate Commerce Act to the time of the making of the lease.

Similarly, in *Livestock Service Terminal Abandonment of Operations, supra*, the Commission stated that the performance by the lessor of services as a common carrier by railroad, from a time long prior to the enactment of Section 1(18) of the Interstate Commerce Act, obligated it to continue these services upon their abandonment by its lessee.

The situation considered by the Commission in the *Hoboken Railroad* and *Livestock Service* cases is to be contrasted with the present one, where the respondents never operated the railroad and never were common carriers by railroad. The undertaking by these respondents of the operation of the railroad would itself be in violation of the statute prohibiting the operation of a line of railroad without first procuring a certificate of convenience and necessity (49 U. S. C. § 1(18)).

The Interstate Commerce Commission, like the two courts below, has itself noted that the decisions relied on by petitioners are inapplicable upon the facts of the present case. The Commission said (*Jay Street Connecting Railroad Abandonment*, 307 I. C. C. 137, 164):

> "The foregoing findings inevitably warrant our concluding that the present carrier business and prospects of future operating results do not support continuation of operation of the applicant's line, and that the cost of restoring its facilities to provide safe operations would constitute an undue and unnecessary burden upon interstate commerce. In our opinion, the same conclusions on the facts and law would justify our permitting the physical abandonment of the line herein by the lessor of the railroad properties [respondents herein], if such lessor were subject to our jurisdiction and therefore obligated to continue the lessee's carrier operations, unless legally relieved of that requirement. We do not agree with the argument of the protestants [petitioners herein] on this point, in support of which they cite *Livestock Terminal Service Co. Abandonment*, 257 I. C. C. 1(7), and cases therein. In our opinion that case is not a valid precedent for requiring that Famous [respondents herein] continue the operations of the applicant unless it decides to apply to abandon the railroad properties."

Although petitioners contended (Complaint par. 15) that respondents were obligated, by virtue of their ownership of land on which the railroad formerly operated, to undertake and carry on the operation of the railroad, petitioners now seem to urge that this obligation extends only to that part of the operation which before 1941 was conducted by the partnerships. Thus, petitioners state (Petition p. 8):

> "If that operation is resumed, the local handling of shipments between the grantor's freight station and the neighboring industrial plants can be effected in many ways which should not be the concern of the courts in this case."

That operation, however, would involve only the transportation of property by water between the Brooklyn waterfront and the terminal points of trunk line railroads. As the Court of Appeals held (Petition p. 19), it would not involve the operation of any line of railroad. The service in question, therefore, would be excepted from the operation of the Interstate Commerce Act by 49 U. S. C. §§ 1 (1) (a), 1 (2) (c) and 1 (18). Under those sections duties are imposed only on "carriers by railroad" (not upon lessors of land to railroads), and transportation of property solely by water is excepted from the coverage of the Act; and the only operation which may not be undertaken or abandoned without Commission approval is the operation by a "carrier by railroad" of "all or any portion of a line of railroad". *Lucking v. Detroit Nav. Co.*, 265 U. S. 346 (1924). Since the lessors herein are not and never have been carriers by railroad the complaint fails to state a claim upon which relief can be granted.

In the absence of any statutory duty or other ground for any relief, the demand by petitioners for a mandatory injunction requiring respondents to reconstitute all or any part of the lawfully abandoned facilities of The Jay Street Connecting Railroad, and to operate them at a heavy loss pending any further application for leave to abandon, was so lacking in equity as to call for prompt dismissal of the complaint. If the asserted unwillingness of respondents to lease or sell the properties to petitioners were material, as in the absence of any obligation upon respondents it clearly is not, petitioners' counsel conceded in argument, as the

opinion of the court below reflects (Petition p. 23), that petitioners in fact never even made an attempt to negotiate with respondents for the use of the premises formerly leased to the railroad. The inequity of petitioners' action could not be more clear, and review by this Court is unnecessary.

II.

THE ACTION IS MOOT

This railroad had already been lawfully abandoned by its operator when this action was commenced (Complaint par. 14).

Following the decision of the Court of Appeals affirming the dismissal of the complaint herein, petitioners did not seek any injunction pending application for certiorari. Accordingly respondents, as they were free to do, sold and conveyed to Consolidated Edison Company property which includes the entire Bridge Street Yard, where The Jay Street Connecting Railroad had its only float bridge and where it conducted the docking operations essential to all its operations (Appendix A, *infra*).

This conveyance was not made without warning to petitioners. They knew of the existence of a contract for the sale of the property from a time prior to the decision of the Commission authorizing abandonment. Respondents moved to expedite the appeal herein (which was not taken until 28 days after the entry of the judgment of the District Court) precisely upon the ground that the pendency of that appeal was interfering with this sale (74a-79a). The Court of Appeals granted this motion on August 28, 1959 (81a). Thereafter, following the affirmance by the Court of Appeals of the judgment dismissing the complaint, petitioners made

no effort to restrain the sale. Instead they waited 87 days before filing the petition for certiorari herein.

The disposal of the property, 45 days after the affirmance below, has as a result of petitioners' own neglect and delay rendered the action moot. E.g. *Heitmuller* v. *Stokes*, 256 U. S. 359 (1921); *Chesapeake Western Ry.* v. *Jardine*, 8 F. 2d 794 (App. D. C., 1925), cert. den. *sub nom. Town of Bridgewater* v. *Jardine*, 270 U. S. 653 (1926); *Fink* v. *Continental Foundry & Machine Co.*, 240 F. 2d 369 (7th Cir., 1957), cert. den. 354 U. S. 938 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
Counsel for Respondents
120 Broadway,
New York 5, N. Y.

SIMPSON THACHER & BARTLETT
Of Counsel

February, 1960.

APPENDIX A

Affidavit Suggesting Mootness

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOSEPH S. WOHL, being duly sworn, deposes and says:

1. In 1945 respondent Famous Realty, Inc. became the owner of land a part of which was occupied under lease by The Jay Street Connecting Railroad and was used by the latter company for railroad operations. Upon the dissolution of Famous Realty, Inc. in 1958, Dr. Moses Spatt and I became the distributees of its property.

2. On or about December 11, 1959, Dr. Spatt and I conveyed to Consolidated Edison Company of New York, Inc. certain of that land, together with the buildings thereon, described as follows:

> "ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York, bounded and described as follows:
>
> BEGINNING at a point on the northerly side of John Street distant 160 feet westerly from the corner formed by the intersection of the northerly side of John Street and the westerly side of Gold Street; running thence northerly parallel with Gold Street 523.79 feet to the Pierhead Line established in 1857; thence westerly along said pierhead line 926.90 feet; thence southerly along the easterly side of Jay Street if extended, 412.47 feet to the northerly side of

John Street; thence easterly along the northerly side of John Street 890.83 feet to the point or place of beginning."

3. The land so conveyed included all of the Bridge Street Yard, formerly occupied by The Jay Street Connecting Railroad. This yard was the focal point of all the traffic formerly carried by The Jay Street Connecting Railroad. It was at this Yard that all the car floats were docked. It was here that all of the incoming freight cars were unloaded from the floats and sent along the Brooklyn waterfront, and it was here that all of the outgoing freight cars were assembled and loaded on car floats for transportation across New York harbor.

4. This sale was made pursuant to a contract entered into on or about July 29, 1958 between Consolidated Edison Company of New York, Inc. and Dr. Spatt and me.

5. In accordance with this contract of sale, certain of the buildings in the Bridge Street Yard and small portions of land adjacent to these buildings which were not immediately needed by Consolidated Edison Company were leased back by it to Dr. Spatt and me through a mesne grantee. None of the property in our possession as lessees under this lease encompasses water frontage, and we are not possessed as such lessees, or otherwise, of the premises where the only docking facilities (a float bridge) of The Jay Street Connecting Railroad were located. Another property owned by us and fronting on the East River was also formerly leased in part to The Jay Street Connecting Railroad and was used by it as a yard for team tracks, which sole function of this yard required no water frontage.

Appendix A

There is not now, and during the time of operation of the railroad there was not, at this property any float bridge or other docking facility for railroad cars.

JOSEPH S. WOHL

Sworn to before me this
17th day of February, 1960.

MILTON LOEWE
NOTARY PUBLIC, State of New York
No. 30-7584125
Qualified in Nassau County
Commission Expires March 30, 1960

(NOTARIAL SEAL)